

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KIMBERLY WELLS,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03033-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment.¹ ECF

¹Under Local Rule 7.1(e)(1), a reply to a motion for summary judgment is limited to ten (10) pages. The Court takes notice that Plaintiff exceeded this ten-page limitation with her Responsive Brief, which totaled sixteen pages, without an order from the Court permitting counsel to exceed the page limit. ECF No. 29. Sanctions have been assessed in similar situations. *See Kano v. National Consumer Cooperative Bank*, 22 F.3d 899 (9th Cir. 1994) (imposing \$1,500 sanctions for failure to comply with FED. R. APP. P. 32(a) by not double spacing and reducing the size of footnotes); *See In re MacIntyre*, 181 B.R. 420, 422 (9th Cir. BAP 1995) (sanctioning appellant for using small type size and 26 footnotes in apparent attempt to circumvent page limit for opening briefs); *See Adriana Intern.*

No. 19, 26. Attorney D. James Tree represents Kimberly Wells (Plaintiff); Special Assistant United States Attorney Summer Stinson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on May 9, 2011, alleging disability since June 30, 2006, due to a pinched nerve in her neck, fibromyalgia, diabetes, sleep apnea, high blood pressure, high cholesterol, insomnia, short term memory loss, left shoulder pain, allergies, and problems with her equilibrium. Tr. 278, 322-323, 327. The applications were denied initially and upon reconsideration. Tr. 160-168, 172-190. Administrative Law Judge (ALJ) Wayne N. Araki held a hearing on April 30, 2013, at which Plaintiff, represented by counsel, and Kimberly Mullinax, vocational expert (VE) testified. Tr. 45-102. The ALJ issued an unfavorable decision on June 24, 2013. Tr. 27-38. The Appeals Council denied review on December 30, 2014. Tr. 1-4. The ALJ's June 24, 2013, decision became the final decision of the Commissioner, which is appealable to the district court pursuant to

Corp. v. Thoeren, 913 F.2d 1406, 1417 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (imposing sanctions for failure to comply with FED. R. APP. P. 32(a)). The Court expects counsel to be concise with his briefing and not recite unnecessary facts or argument made in prior briefing. Counsel should adhere to the mandates of Local Rule 7.1(e) in all future pleadings **as the Court is inclined to strictly enforce the page limits set out in Local Rule 7.1 from this date forward.**

1 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on February 24,
2 2015. ECF No. 1, 4.

3 **STATEMENT OF FACTS**

4 The facts of the case are set forth in the administrative hearing transcript, the
5 ALJ's decision, and the briefs of the parties. They are only briefly summarized
6 here.

7 Plaintiff was 36 years old at the alleged date of onset, June 30, 2006. Tr.
8 278. She completed the twelfth grade in 1988 and received some training in
9 business skills in 1998. Tr. 328. She has past work as a bouncer, dispatcher,
10 foreman, packer, and server. Tr. 329. Plaintiff reported she stopped working on
11 June 30, 2008, because of her condition. Tr. 328.

12 At the administrative hearing, Plaintiff described fibromyalgia, a pinched
13 nerve, carpal tunnel, diabetes, insomnia, sleep apnea, and high blood pressure. Tr.
14 63-74. She testified that the impairments caused difficulties in using her hands
15 such as dropping items and typing, pain and numbness in her hands that would
16 wake her up during the night, numbness in her feet and arms, difficulty completing
17 household chores, difficulty sleeping, difficulty holding the steering wheel,
18 difficulty in holding her head in one position, and difficulty in sitting still. Tr. 63-
19 78, 81, 83.

20 On December 31, 2008, John Naiden, M.D., opined that Plaintiff was limited
21 to a sedentary work level, but could not sustain work activity for any amount of
22 time. Tr. 616. These limitations were in existence for six to twelve weeks while
23 Plaintiff recovered from surgery. Tr. 617. On March 24, 2009, Andres Laufer,²
24 M.D. opined that Plaintiff was limited to a sedentary work level and could sustain
25 work activity for one to ten hours per week. Tr. 619. Dr. Laufer opined that these
26 limitations would last for an unspecified number of months. Tr. 620. On July 14,
27 2009, Dr. Laufer opined that Plaintiff was limited to a sedentary work level, but

28 ²The ALJ misspells his name as Andres Lavefen. Tr. 34.

1 she could not sustain work activity for any amount of time. Tr. 623. Again, he
2 opined these limitations would be in effect for an unspecified number of months.
3 Tr. 624. On October 29, 2009, Terri James from Workfirst opined that Plaintiff
4 was limited to a sedentary work level, but was unable to sustain work activity for
5 any amount of time. Tr. 627. Ms. James opined these limitations would last six
6 months. Tr. 629. On December 2, 2011, Dr. Renzi opined that Plaintiff was
7 limited to sedentary work and that the limitation would last twelve months. Tr.
8 631.

9 STANDARD OF REVIEW

10 The ALJ is responsible for determining credibility, resolving conflicts in
11 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
12 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
13 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
14 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
15 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
16 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
17 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
18 another way, substantial evidence is such relevant evidence as a reasonable mind
19 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
20 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment for that of the ALJ.
22 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
23 evidence will be set aside if the proper legal standards were not applied in
24 weighing the evidence and making the decision. *Browner v. Secretary of Health*
25 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
26 supports the administrative findings, or if conflicting evidence supports a finding
27 of either disability or non-disability, the ALJ's determination is conclusive.
28 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that physical or mental impairments prevent her from engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do her past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work, and (2) specific jobs exist in the national economy which the claimant can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot make an adjustment to other work in the national economy, a finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On June 24, 2013, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since June 30, 2006, the alleged date of onset. Tr. 29.

At step two, the ALJ determined Plaintiff had the following severe impairments: arthropathies vs. fibromyalgia and carpal tunnel syndrome. Tr. 29-31.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 31-32.

At step four, the ALJ assessed Plaintiff’s residual function capacity (RFC) and determined she could perform a range of light work with the following

1 restrictions:

2 [E]xcept the claimant can stand or walk in two hour intervals for eight
3 hours per day and sit in two hour intervals for eight hours per day. The
4 claimant can occasionally stoop, crouch, kneel, balance, and climb
5 ramps and stairs. The claimant cannot crawl or climb ladders. She can
6 frequently reach, handle, and finger.

7 Tr. 32. The ALJ found that Plaintiff was able to perform her past relevant work as
8 a bouncer, dispatcher, front desk clerk, packing house supervisor, and customer
9 service clerk. Tr. 35.

10 In the alternative to finding that Plaintiff could perform her past relevant
11 work, the ALJ found that, considering Plaintiff's age, education, work experience
12 and RFC, and based on the testimony of the vocational expert, there were other
13 jobs that exist in significant numbers in the national economy Plaintiff could
14 perform by applying the Medical Vocational Guidelines, Rule 202.21. Tr. 36.

15 The ALJ concluded Plaintiff was not under a disability within the meaning
16 of the Social Security Act at any time from June 30, 2006, through the date of the
17 ALJ's decision, June 24, 2013. Tr. 37.

18 ISSUES

19 The question presented is whether substantial evidence supports the ALJ's
20 decision denying benefits and, if so, whether that decision is based on proper legal
21 standards. Plaintiff contends the ALJ erred by (1) failing to find obesity, cervical
22 radiculopathy, and sleep apnea severe at step two; (2) failing to accord the proper
23 weight to the medical opinions in the file; and (3) failing to properly consider
24 Plaintiff's testimony about the severity of her symptoms.

25 DISCUSSION

26 A. Step Two

27 A step two, the ALJ determined that Plaintiff had the severe impairments of
28 arthropathies vs. fibromyalgia and carpal tunnel syndrome and non-severe

1 impairments of sleep apnea, hypertension, diabetes mellitus, depressive disorder,
2 and anxiety disorder. Tr. 29-31. Plaintiff argues that the ALJ failed to address her
3 obesity and cervical radiculopathy and that sleep apnea, which was determined to
4 be non-severe, should have been found severe. ECF No. 19 at 4-18.

5 The Defendant argues that any error in designating specific impairments
6 severe or not at step two does not prejudice a claimant so long as step two is
7 resolved in the claimant's favor and cites *Burch v. Barnhart*, 400 F.3d 676 (9th
8 Cir. 2005) as support. ECF No. 26 at 4. This is a misstatement of *Burch*. In
9 *Burch*, while the ALJ did not find the impairment of obesity severe at step two, he
10 did discuss the claimant's obesity in his decision and considered it in forming the
11 RFC. *Id.* at 683. The *Burch* court assumed that the ALJ's failure to address
12 obesity at step two was legal error but concluded that the error harmless because it
13 would not have impacted the ALJ's analysis at either steps four or five, which did
14 address obesity. *Id.* at 682.

15 In this case, the ALJ's decision is void of any discussion or consideration of
16 obesity and cervical radiculopathy. Therefore, this case diverges from *Burch*.
17 These impairments were not addressed at steps two through five. The failure of an
18 ALJ to consider the impact of Plaintiff's obesity and cervical radiculopathy cannot
19 be considered harmless error under *Burch*. See e.g. *Petersen v. Barnhart*, 213 Fed.
20 Appx 600, 605 n.3 (9th Cir. 2006).

21 Furthermore, the step-two analysis is "a de minimis screening device used to
22 dispose of groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir.
23 2005). An impairment is "not severe" if it does not "significantly limit" the ability
24 to conduct "basic work activities." 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic
25 work activities are "abilities and aptitudes necessary to do most jobs." 20 C.F.R. §
26 416.921(b). "An impairment or combination of impairments can be found not
27 severe only if the evidence establishes a slight abnormality that has no more than a
28 minimal effect on an individual's ability to work." *Smolen v. Chater*, 80 F.3d

1 1273, 1290 (9th Cir. 1996) (internal quotation marks omitted).

2 Pursuant to the SSA's own internal procedures, once a claimant has shown
3 that she suffers from a medically determinable impairment, she next has the burden
4 of proving that these impairments or their symptoms affect her ability to perform
5 basic work activities. S.S.R. 96-3p; S.S.R. 96-7p. If she meets this burden, the
6 ALJ *must* find that the impairment is "severe" and move to the next step in the
7 SSA's five-step process. S.S.R. 96-3p.

8 Here, there is evidence that Plaintiff suffered from both obesity and cervical
9 radiculopathy. Plaintiff's BMI ranged from 47.1 to 53.4. Tr. 567, 641, 724. The
10 ALJ gave some weight to Dr. Stanley's opinion, who included obesity as a severe
11 impairment. Tr. 135. The ALJ gave Dr. Drenguis's opinion great weight, Tr. 35,
12 and Dr. Drenguis diagnosed Plaintiff with C5-6 radiculopathy. Tr. 555. The ALJ
13 cannot ignore evidence of an impairment presented by Plaintiff. *See* 20 C.F.R. §
14 404.1520(a)(3) ("We will consider all evidence in your case record when we make
15 a determination or decision whether you are disabled"). As such, the ALJ was
16 required to address these impairments and make a determination whether or not
17 they were severe and include any resulting limitations in the RFC. *See* S.S.R. 96-
18 8p (the RFC must include limitations resulting from all impairments, both severe
19 and non-severe).

20 Therefore, the case is remanded for the ALJ to address Plaintiff's obesity
21 and cervical radiculopathy and determine if they are severe or non-severe at step
22 two and address any resulting limitations in a new RFC.

23 As for Plaintiff's diagnosis of sleep apnea, the ALJ concluded that since
24 Plaintiff testified that she slept better with a CPAP machine, her sleep apnea was
25 not severe. Tr. 29. This finding is not supported by substantial evidence. The
26 ALJ relied on a single statement while ignoring the further explanation provided
27 by Plaintiff and ignoring the medical evidence of record. When asked if her
28 medication helps her sleep, she testified that "sometimes it does, sometimes it

1 doesn't." Tr. 71. When asked "Does [the CPAP] seem to be helping?" to which
2 Plaintiff responded "Yes." Tr. 72. She further explained that her CPAP has been
3 helping with her sleep apnea, but she continues to experience fatigue and difficulty
4 sleeping. Tr. 71-72. Furthermore, medical evidence showed that Plaintiff reported
5 continued difficulty sleeping even with the use of the CPAP. Tr. 653. Since the
6 case is being remanded for additional proceedings to address Plaintiff's obesity and
7 cervical radiculopathy, the ALJ is instructed to further address Plaintiff's sleep
8 apnea at step two and to include any resulting limitations in a new RFC.

9 **B. Medical Opinion Evidence**

10 Plaintiff challenges the weight given to John Naiden, M.D., Andres Laufer,
11 M.D., Paula Renzi, D.O., and occupational therapist, Terri James. ECF No. 19 at
12 19-22. In his decision, the ALJ gave "little weight" to the opinions of Dr. Naiden,
13 Dr. Laufer, and Dr. Renzi, all of whom limited Plaintiff to a sedentary work level,
14 because they were inconsistent with the imaging findings and were inconsistent
15 with the physical examination findings. Tr. 34.

16 In weighing medical source opinions, the ALJ should distinguish between
17 three different types of physicians: (1) treating physicians, who actually treat the
18 claimant; (2) examining physicians, who examine but do not treat the claimant;
19 and, (3) nonexamining physicians who neither treat nor examine the claimant.
20 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
21 weight to the opinion of a treating physician than to the opinion of an examining
22 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
23 should give more weight to the opinion of an examining physician than to the
24 opinion of a nonexamining physician. *Id.*

25 When a treating physician's opinion is not contradicted by another
26 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
27 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
28 physician's opinion is contradicted by another physician, the ALJ is only required

1 to provide “specific and legitimate reasons” for rejecting the opinion of the treating
2 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
3 an examining physician’s opinion is not contradicted by another physician, the
4 ALJ may reject the opinion only for “clear and convincing” reasons. *Lester*, 81
5 F.2d at 830. When an examining physician’s opinion is contradicted by another
6 physician, the ALJ is only required to provide “specific and legitimate reasons” for
7 rejecting the opinion of the examining physician. *Id.* at 830-831.

8 Plaintiff asserts that the specific and legitimate standard is appropriate in this
9 case. EFC No. 19 at 19. Defendant asserts that the ALJ’s determination need only
10 be supported by more than a scintilla of evidence to be upheld. ECF No. 26 at 10.
11 In accord with *Murray* and *Lester*, the correct standard is specific and legitimate.

12 First, the ALJ determined that the limitations to sedentary work were not
13 supported by the May 2009 MRI or the May 2012 MRI. Tr. 34. The ALJ noted
14 that the May 2009 MRI showed “only mild impingement of the cervical spine at
15 C5-6,”³ and the May 2012 MRI showed “only small central protrusions at C5-6
16 and C6-7 discs with mild stenosis of the canal.” *Id.* Additionally, the ALJ
17 determined that the opinions of Dr. Naiden, Dr. Laufer, and Dr. Renzi were
18 inconsistent with findings that Plaintiff had full motor strength throughout the
19 extremities, intact gait, and a full range of motion in the upper and lower
20 extremities. Tr. 34.

21 Stating that the “medical opinions are not supported by sufficient objective
22 findings or are contrary to the preponderant conclusions mandated by the objective
23 findings” does not meet the specific and legitimate standard. *Embrey v. Bowen*,
24 849 F.2d 418, 421 (9th Cir. 1988). The ALJ is required to do more than offer his
25

26 ³The May 14, 2009, MRI showed degenerative disc disease at C5-6 and C6-
27 7 and small subligamentous left paracentral disc herniation, impinging slightly on
28 the neural foramen on the left at C5-6. Tr. 456.

1 conclusions, he “must set forth his interpretations and explain why they, rather
2 than the doctors’, are correct.” *Id.* Here, the ALJ simply repeated the objective
3 findings, but did not explain why these objective findings merited weight, but the
4 doctors’ other conclusions and opinions did not. Therefore, these reasons do not
5 meet the specific and legitimate standard, and the ALJ is directed to readdress
6 these opinions upon remand.

7 Furthermore, Dr. Laufer’s opinions were based on Plaintiff’s cervical
8 radiculopathy and he received copies of Plaintiff’s treatment for cervical
9 radiculopathy by other providers. Tr. 442-444, 446-448, 451-452, 454, 458, 461,
10 463-464, 604-605, 619, 623. Likewise, Dr. Renzi treated Plaintiff for cervical
11 radiculopathy and reviewed records from Dr. Kwon, who also treated Plaintiff for
12 cervical radiculopathy. Tr. 430-440, 446-454, 458, 576-579. Since the case is
13 being remanded for the ALJ to address cervical radiculopathy, it is also appropriate
14 that the ALJ readdress the opinions of Dr. Laufer and Dr. Renzi.

15 Plaintiff also asserts that the ALJ failed to address the opinion of
16 occupational therapist, Terri James, provided in October of 2009. ECF No. 19 at
17 21-22. Terri James provided an opinion on October 26, 2009, stating that Plaintiff
18 was unable to participate in work activities and was limited to lifting and carrying
19 up to five pounds frequently with occasional carrying of up to ten pounds
20 maximum and that these limitations would last for six months. Tr. 414-416. The
21 ALJ does reference an opinion from October 2009, but characterizes it as an
22 opinion provided by Dr. Laufer. Tr. 34. Therefore, it is unclear if the ALJ actually
23 failed to address the opinion from Ms. James, or if he mistakenly assumed it was
24 from Dr. Laufer. Nonetheless, the case is already being remanded to address the
25 medical source opinions addressed above, so the ALJ is also directed to address the
26 opinion of Ms. James on remand.

27 **C. Credibility**

28 Plaintiff contests the ALJ’s adverse credibility determination in this case.

1 ECF No. 19 at 22-29.

2 It is generally the province of the ALJ to make credibility determinations,
3 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
4 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
5 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
6 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
7 *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must
8 identify what testimony is not credible and what evidence undermines the
9 claimant's complaints." *Lester*, 81 F.3d at 834.

10 The ALJ found Plaintiff less than fully credible concerning the intensity,
11 persistence, and limiting effects of her symptoms. Tr. 33. The ALJ reasoned that
12 Plaintiff was less than fully credible because (1) her physical and mental symptom
13 reporting was not supported by the longitudinal examination findings and (2) her
14 limited work activity in 2007 and 2008 indicated that Plaintiff's daily activities,
15 had been greater than what Plaintiff reported. Tr. 33-34.

16 As for the ALJ's first reason, that Plaintiff's symptom reporting was not
17 supported by examination findings, alone is not sufficient to meet the specific,
18 clear and convincing standard. Objective medical evidence is a "relevant factor in
19 determining the severity of the claimant's pain and its disabling effects," but it
20 cannot be the sole reason. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
21 Considering the other reason provided by the ALJ for finding Plaintiff less than
22 fully credible is insufficient to meet the specific, clear and convincing standard,
23 this reason standing alone cannot support an adverse credibility finding. *See infra*.

24 The ALJ also found "[w]hile her work activity did not rise to the level of
25 substantial gainful activity, it does indicate that the claimant's daily activities have,
26 at least at times, been somewhat greater than what the claimant has generally
27 reported." Tr. 34. This is not a specific, clear and convincing reason to discount
28 credibility, because it does not identify what activities impeach which of Plaintiff's

1 statements. See Lester, 81 F.3d at 834 (“the ALJ must identify what testimony is
2 not credible and what evidence undermines the claimant’s complaints”).

3 This Court is aware of *Carter v. Astrue*, an unpublished opinion upholding
4 an ALJ’s fifth reason for discounting credibility in a case where the claimant
5 worked part time for nearly a year after his alleged onset date. 472 F. App’x 550,
6 552 (9th Cir. 2012). The specifics of claimant’s statements and activities in that
7 case are not apparent, but the case law cited by the *Carter* court approves the
8 requirement of “specific findings” regarding “daily activities involving skills.”
9 Further, the language of the *Carter* court appears to invoke established law on the
10 impeachment of credibility by the specifics of daily living, and not a new category
11 of impeachment by part time work *per se*. For these reasons, and the ALJ’s failure
12 to cite specific facts in the case at bar, *Carter* is distinguishable.

13 As such, the ALJ is directed to readdress Plaintiff’s credibility on remand.

14 REMEDY

15 The decision whether to remand for further proceedings or reverse and
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
17 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
18 where “no useful purpose would be served by further administrative proceedings,
19 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
20 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
21 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
22 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
23 (noting that a district court may abuse its discretion not to remand for benefits
24 when all of these conditions are met). This policy is based on the “need to
25 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
26 outstanding issues that must be resolved before a determination can be made, and it
27 is not clear from the record that the ALJ would be required to find a claimant
28 disabled if all the evidence were properly evaluated, remand is appropriate. *See*

1 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
2 F.3d 1172, 1179-80 (9th Cir. 2000).

3 In this case, it is not clear from the record that the ALJ would be required to
4 find Plaintiff disabled if all the evidence were properly evaluated. Further
5 proceedings are necessary for the ALJ to make a new step two determination, to
6 reweigh the medical opinion evidence, and to make a new credibility finding.
7 Upon remand, the ALJ will also need to supplement the record, reconsider the
8 medical evidence, and, if necessary, call a medical expert or vocational expert or
9 both to properly address steps two through five.

10 CONCLUSION

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 26**, is
13 **DENIED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is
15 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
16 additional proceedings consistent with this Order.

17 3. Application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy
19 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
20 **and the file shall be CLOSED.**

21 DATED February 18, 2016.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

22
23 JOHN T. RODGERS
24 UNITED STATES MAGISTRATE JUDGE
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